

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA THOMAS BALES,

Defendant.

CASE NO. CR20-0090-JCC

ORDER

This matter comes before the Court on Defendant Joshua Thomas Bales's motion to dismiss (Dkt. No. 73). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

The COVID-19 pandemic has presented the courts with unprecedented challenges—among them, determining how to conduct jury trials without gravely endangering public health and safety and without violating a criminal defendant's right to be tried by a jury drawn from a fair cross section of the community. Beginning on March 6, 2020, Chief Judge Martinez issued a series of General Orders modifying courthouse operations in light of local conditions related to COVID-19 and suspending criminal jury trials in the Western District of Washington. *See* W.D. Wash. General Order Nos. 01-20, 02-20, 07-20, 08-20, 11-20, 13-20, 15-20, 18-20. Most

1 recently, Chief Judge Martinez issued an order extending the Court’s modified operations
2 through March 31, 2021 based on rising infection rates and the fact that most potential jurors will
3 not be fully vaccinated against COVID-19 for months. W.D. Wash. General Order No. 18-20 at
4 1 (Dec. 30, 2020).

5 Defendant Joshua Thomas Bales has been charged by indictment with one count of
6 cyberstalking and five counts of making interstate threats. (Dkt. No. 15.) The Government
7 alleges that over the last two years, Mr. Bales sent his ex-girlfriend, X.C., hundreds of harassing
8 and degrading e-mails threatening to “destroy” her, injure her, and harm her reputation. (*Id.*) Mr.
9 Bales was indicted on July 24, 2020, (*id.*), and trial was scheduled for September 14, 2020, (Dkt.
10 No. 19).

11 Ten days before the scheduled trial date, Chief Judge Martinez issued an order extending
12 the Court’s modified operations because “[i]n-person trials continue to present an unacceptable
13 public health risk” and

14 [t]he Court continues to find that, due to the current inability to
15 obtain an adequate spectrum of jurors and the effect of the . . . public
16 health situation on the availability of witnesses, counsel, and Court
17 staff to be present in the courtroom, the time period of the
18 continuances implemented by this General Order will be excluded
19 under the Speedy Trial Act, as the Court finds that the ends of justice
served by ordering the continuances outweigh the best interests of
the public and any defendant’s right to a speedy trial, pursuant to 18
U.S.C. § 3161(h)(7)(A).

20 *Id.* at 3. Later that day, the Government moved to continue Mr. Bales’s trial until at least
21 December 2020 due to the courthouse closure and the challenges of arranging for X.C. to travel
22 from Australia to testify during the pandemic. (*See generally* Dkt. No. 22.) The Australian
23 government had prohibited international travel without prior authorization, and even if
24 authorization was obtained, long-distance air travel during the pandemic posed health risks to
25 X.C. and others. (*Id.* at 3.) Given the logistical challenges and health concerns associated with
26 international travel, the Government argued that it was important to schedule the trial for a date

1 when it would be safe to travel internationally and to impanel a jury. (*Id.* at 4.)

2 On September 10, 2020, the Court vacated the September 14, 2020 trial based on General
3 Order 13-20 and did not set a new trial date at that time. (Dkt. No. 23.) In November, the Court
4 directed the parties to appear for a status conference on December 1, 2020 to set a new trial date.
5 (Dkt. No. 40 at 2.) The Court also entered on the record its finding that the period of time from
6 the original trial date to the date of the status conference was excludable under the Speedy Trial
7 Act because the ends of justice served by continuing trial outweighed the best interests of the
8 public and Mr. Bales in a speedy trial. (*Id.* (citing 18 U.S.C. § 3161(h)(7)(A)).) The Court found
9 the pandemic necessitated a trial continuance because of the difficulty of obtaining an adequate
10 spectrum of jurors to represent a fair cross section of the community as well as the inability of
11 jurors, witnesses, counsel, and Court staff to be present in the courtroom. (*Id.* at 1–2.) Failing to
12 grant a continuance would make an in-person trial at which Mr. Bales could exercise his right to
13 confrontation impossible and thus would result in a miscarriage of justice. (*Id.* at 2 (citing 18
14 U.S.C. § 3161(h)(7)(B)(i)).)

15 At the December 1 status conference, the Court heard from counsel and set trial for
16 March 1, 2021. (Dkt. Nos. 44, 59.) The Court memorialized its findings in a written order on
17 December 7, 2020, excluding the period from September 10, 2020 through March 1, 2021 under
18 18 U.S.C. § 3161(h)(7)(A) because the pandemic made it unlikely that a fair or safe trial could
19 proceed any earlier. (Dkt. No. 59 at 2 (citing 18 U.S.C. § 3161(h)(7)(b)(i)).) In so concluding, the
20 Court took into account the increasing COVID-19 infection rate, the imposition of new state and
21 local restrictions on business operations and social gatherings, and the fact that government
22 restrictions on overseas travel could impact the ability of the alleged victim, a Chinese citizen
23 who resides in Australia, to travel to the district to testify. (*Id.* at 1–2.)

24 Mr. Bales moves to dismiss, arguing the Speedy Trial Act has been violated because
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more than 70 days of unexcused time has elapsed since his indictment. (Dkt. No. 73 at 1.)¹

II. DISCUSSION

1. Motion to Dismiss

The Speedy Trial Act generally requires a criminal defendant to be brought to trial within 70 days of his or her initial appearance or indictment. 18 U.S.C. § 3161(c)(1). Mindful of the need for flexibility, Congress set forth several mechanisms for excluding time from the 70-day period. *See* 18 U.S.C. § 3161(h); *Zedner v. United States*, 547 U.S. 489, 497 (2006) (“[T]he Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases.”). The Act includes a list of automatic exclusions for delays resulting from pretrial proceedings, the absence or unavailability of a defendant or essential witness, interlocutory appeals, and other similar causes. *See* 18 U.S.C. § 3161(h)(1)–(7). The Act also permits the court to continue a trial and exclude the resulting delay from the speedy trial period when it finds that “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” *Id.* § 3161(h)(7)(A).

In determining whether to grant an ends-of-justice continuance, the Court must consider several factors, including “whether the failure to grant such a continuance would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.” *Id.* § 3161(h)(7)(B)(i)–(iv). The Court must “set forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice [would be] served” by granting the excludable delay. *United States v. Frey*, 735 F.2d 350, 352 (9th Cir. 1984). Although the Court

¹ Mr. Bales also moves to dismiss on the ground that his right to a speedy trial under the Sixth Amendment has been violated. (Dkt. No. 73 at 1, 7.) In determining whether an accused’s constitutional right to a speedy trial has been violated, the Court applies a balancing test and considers (1) the length of the delay; (2) the reason for the delay; (3) whether, when, and how a defendant asserted his right to a speedy trial; and (4) whether a defendant was prejudiced by the delay. *Doggett v. United States*, 505 U.S. 647, 651 (1992) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). Mr. Bales makes no argument as to why the Court should find a constitutional violation under this standard, and so the Court declines to consider his constitutional challenge.

1 must consider the statutory factors at the time it grants the continuance, simultaneous on-the-
2 record findings are “unnecessary so long as the trial court later shows that the delay was
3 motivated by proper considerations.” *United States v. Bryant*, 726 F.2d 510, 511 (9th Cir. 1984).

4 Mr. Bales argues the 70-day speedy trial period has elapsed because the time from
5 September 10, 2020 to March 1, 2021 is not properly excludable as an ends-of-justice
6 continuance. (*See generally* Dkt. No. 73.) First, he argues the Court did not contemporaneously
7 consider the statutory factors when it continued the September 14, 2020 trial date. (*Id.* at 4–5.)
8 Specifically, he likens his case to *United States v. Frey*, where the Ninth Circuit held that a
9 district court that had miscalculated the speedy trial period could not later justify the unwitting
10 delay by entering a *nunc pro tunc* order excusing the delay as an ends-of-justice continuance.
11 (Dkt. No. 73 at 5 (citing *Frey*, 735 F.2d at 353).)

12 While the better practice would have been for the Court to enter its detailed ends-of-
13 justice findings contemporaneous with the September 10, 2020 continuance, it is evident from
14 the record and the Court’s citation to General Order 13-20 that the continuance was based on a
15 consideration of the proper statutory factors. This is not a circumstance like in *Frey* where the
16 Court’s ends-of-justice orders attempted to justify an unwitting delay or a delay motivated by
17 improper considerations. The Court’s orders setting forth its findings on the record amply justify
18 excluding the period from September 10, 2020 to March 1, 2021.

19 Second, Mr. Bales argues the continuance was improper because the Court vacated the
20 September 14, 2020 jury trial without setting a new trial date. (Dkt. No. 73 at 6.) Mr. Bales relies
21 on *Furlow v. United States*, where the Ninth Circuit upheld an ends-of-justice continuance
22 resulting from the eruption of Mt. St. Helens, in part, because the district court set a specific trial
23 date. 644 F.2d 764, 769 (9th Cir. 1981). While *Furlow* also involved a continuance necessitated
24 by a public emergency, the nature of the COVID-19 pandemic and its effect on the Court’s
25 ability to conduct safe and fair jury trials is unprecedented. Vacating the trial date, and then
26 setting a status conference at which to determine when a jury trial would be possible and whether

1 the ends of justice warranted excluding the additional time until then from the speedy trial clock,
2 was not unreasonable under the circumstances. Accordingly, the Court DENIES Mr. Bales's
3 motion to dismiss.²

4 2. Additional Continuance

5 Trial is presently scheduled for March 1, 2020. (Dkt. No. 59.) At a status conference on
6 February 3, 2021, the Court and the parties addressed the need to further continue the trial date
7 because our state and our district are still significantly impacted by COVID-19. (Dkt. No. 78.)
8 Over the last several months, the daily number of positive cases, hospitalizations, and deaths
9 have significantly increased. *See* W.D. Wash. General Order 18-20 at 1 (Dec. 30, 2020). A more
10 highly contagious strain of the virus has also started spreading in King County. *See*
11 <https://www.kingcounty.gov/depts/health/covid-19.aspx>. While a statewide vaccination effort is
12 underway, it is unlikely that most potential jurors will be fully vaccinated in the immediate
13 future. *See* W.D. Wash. General Order 18-20 at 2 (Dec. 30, 2020). Public health guidance
14 continues to impact the ability of jurors, witnesses, counsel, and Court staff to be present in the
15 courtroom, and continues to make it difficult, if not impossible, for the Court to obtain an
16 adequate spectrum of jurors to represent a fair cross section of the community. The Court finds
17 that proceeding with trial earlier than June 1, 2021 is likely impossible. *See* 18 U.S.C. §
18 3161(h)(7)(B)(i). The Court therefore FINDS the ends of justice served by continuing trial to
19 June 1, 2021 outweigh the public and Mr. Bales's interests in a speedy trial under 18 U.S.C. §
20 3161(h)(7)(A).

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25 ² Because the Court finds the period from September 10, 2020 to March 1, 2021 to be properly
26 excluded from the speedy trial period, the Court need not address the periods that were also
excluded under one of the enumerated exceptions.

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court DENIES the motion to dismiss (Dkt. No. 73) and
3 further ORDERS:

- 4 1. Trial is CONTINUED to June 1, 2021 at 9:30 a.m.
5 2. The pretrial motions deadline is April 20, 2021.
6 3. The period of time between the date of this Order and the new trial date is an
7 excludable time period under 18 U.S.C. § 3161(h)(7)(A).

8 DATED this 5th day of February 2021.

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12 John C. Coughenour
13 UNITED STATES DISTRICT JUDGE
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